Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLANTS

[Consents To The Filing Of The Within Brief Attached As Appendix "A"]

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I

QUESTION PRESENTED

The question to which this brief is addressed is whether a state court can abrogate a remedy guaranteed by the Constitution of the United States and recognized by numerous decisions of the Federal judiciary, and, in particular:

1. Whether it is constitutionally permissible for a state court to hold that payment of just compensation for the taking of private property for a public use, provided for by the Fifth and Fourteenth Amendments, is *never* available as a remedy to a property owner who complains of such taking by means of a governmental regulation which effectively deprives him of his property?

2. Whether it is constitutionally permissible for a state court to hold that the *only* remedy available to landowners whose property has been taken by a governmental regulation effectively depriving them of their property is judicial invalidation of such regulation?

II

INTEREST OF AMICUS CURIAE

This brief is presented in order to provide the Court with an exemplar of what actually happens to the owners of undeveloped real property in a legal atmosphere in which governmental entities can, by regulation, deprive said owners of the right to utilize and develop their property without any fear of being called upon to pay compensation.

Glendale Federal Savings and Loan Association ("Glendale Federal"), an instrumentality of the United States of America, is a mutually-owned federal savings and loan association chartered by the Federal Home Loan Bank Board and having its main office in Glendale, California. Its principal business is the making of loans, repayment of which is secured

by deeds of trust on real property; and from time to time, as a consequence of foreclosure proceedings occurring under such deeds of trust, Glendale Federal, through legal process, becomes the fee owner of the real property.

In August of 1971, at a trustee's sale foreclosing a deed of trust of which it was beneficiary, Glendale Federal acquired for a foreclosure bid of more than $6,000,000, and thus became the owner of, a largely unimproved parcel of approximately 1,700 acres located in, and comprising approximately 35% of the undeveloped land area of, the City of San Juan Capistrano ("the City"), County of Orange, California ("the subject property").

Unless it is purchased or acquired through eminent domain by the City or other governmental entity, the reasonable and economically feasible use for the subject property is as a site primarily for residential development.[1] (There is, and for many years has been, a critical need for housing in the Orange County area, including the City.) Although the City desires to preserve the subject property for "open space", neither it nor any other governmental entity is (or for the past decade has been) willing and able to acquire the subject property by any means which would require the payment of just compensation therefor. Nevertheless, and despite the burden upon Glendale Federal of holding a stagnant asset upon which it must pay *ad valoreum* real property taxes and other carrying costs, the City has utilized governmental regulation to effectively thwart Glendale Federal's ability to develop such property. In effect, Glendale Federal's property is being held hostage to the City's desire to acquire open space without the payment of compensation.[2]

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[1] The City has acknowledged that the subject property, which is adjacent to and overlooks Interstate Highway 405, is suitable for residential use.

[2] Glendale Federal's costly and protracted dispute with the City eventually resulted in federal court litigation that eventually culminated in a stipulated judgment that, at least in theory, has resolved the controversy. (In fact, the City, emboldened by recent California judicial decisions virtually eliminating the right of landowners to compensation for the deprivation by regulation of the right to use

(Footnote continued on next page)

Since the details of what happened to Glendale Federal are obviously not in issue in the within appeal, Glendale Federal will summarize as succinctly as possible the various dilatory maneuvers and devices employed by the City to frustrate development of the subject property and retain it as a "scenic resource" for the benefit of the community.

Contemporaneously with, and immediately after, Glendale Federal's acquisition of the subject property, the City enacted a series of restrictive ordinances purportedly to control development of private property, and thereby protect the flora and fauna located thereon. Thereafter, beginning in or about late 1973, the City enacted a series of successive moratoria ordinances which were designed to, and did, suspend all development pending the adoption of a General Plan and zoning ordinances consistent therewith.

Finally, in December of 1974, the City adopted its General Plan, which incorporated, *inter alia,* the following goals and policies:

> (a) "The City of San Juan Capistrano should give the highest priority to acquiring or otherwise preserving large amounts of the present open space within the City. . . ."
>
> (b) "It shall be City policy that not less than 25% of the current total City area shall be preserved and maintained as permanent public and private open space through the institution of a combination of bold controls, acquisitions, and negotiated contracts with property owners."

Under the General Plan, the bulk of Glendale Federal's land was designated as "open space"; and the enabling Land Use Management Code, enacted in September, 1975, deli-

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(Footnote continued from preceeding page)

property, has failed to carry out its obligations under the judgment.) Be that as it may, however, Glendale Federal has been motivated to present this amicus brief in order to spare other landowners (including many with more limited resources) the expense and vicissitudes which it has suffered in an effort to vindicate the principal that a landowner should not be effectively deprived of its property without payment of just compensation.

neated such land as "GM-Growth Management District", a zone that permitted certain limited uses, such as animal grazing, egg production, parks, and apiaries.[3]

In March, 1977, Glendale Federal brought an action pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States; Sections 1983 and 1985(3) of Title 42, United States Code; and a pendent claim was included pursuant to Article One, Section 19 of the Constitution of the State of California.[4]

The City moved (1) for a dismissal of the action and (2) for the federal court to abstain from the exercise of its jurisdiction — a motion that had become fashionable for California municipalities in a federal forum. The motions were denied[5] and eventually the action was settled by a judgment entered January, 1979, pursuant to a stipulation of the parties.

The judgment (1) recognizes that Glendale Federal had been delayed in the development and/or sale of its property as the result of the adoption of various ordinances enacted by the City and that it has the presently vested right to subdivide, develop and sell portions of its property; (2) orders the City to, among other things, amend its General Plan and zoning ordinances, and adopt a development plan already approved by the parties so that Glendale Federal, or any assignee, could develop its property over a specified period of time and without

[3] A "growth management ordinance" (Ordinance No. 314), adopted by the City on December 14, 1976, purports to limit development to no more than 400 units per year. By the terms of the ordinance, projects containing twelve or fewer lots or units, and the developers of lots of at least 2½ acres were exempted therefrom. Property owners subject to the ordinance who wished to develop their property are required to compete in accordance with complex point system which purports to evaluate the quality of a particular project.

[4] Civil No. 77-1066-LEW on the docket of the United States District Court for the Central District of California. By reason of its claims, Glendale Federal sought, in effect, declaratory and injunctive relief, and compensatory damages.

[5] As part of its ruling, the Court dismissed Glendale Federal's pendent state claim.

the constraints of the City's growth management ordinance; and (3) specifies that the City was to act so as to permit the issuances of building permits for 138 residential units in the year 1979.

At the present time, the City has not amended its General Plan; has not amended its zoning ordinances; has not adopted the development plan; and has not issued any building permits, all as provided by the judgment of the District Court.[6] Glendale Federal submits that the City has been encouraged by the recent expansive decisions of the California courts, including the decision that is the subject of the within appeal.

III

ARGUMENT

A. AFFIRMANCE OF THE JUDGMENT OF THE CALIFORNIA SUPREME COURT IN THE WITHIN APPEAL WOULD BE DETRIMENTAL TO PROPERTY OWNERS IN THAT (1) THEY WOULD BE DEPRIVED OF A PROMPT AND EFFICACIOUS REMEDY; (2) PRIVATE PROPERTY COULD BE PUT TO PUBLIC USE WITHOUT PAYMENT OF ANY COMPENSATION; AND (3) THE MARKET FOR THEIR REAL PROPERTY WOULD BE VIRTUALLY ELIMINATED

In considering the within appeal, this Court should be cognizant of the practical, "real world" impact an affirmance of the decision of the California Supreme Court would have. As Glendale Federal shall hereinafter demonstrate, such an affirmance would (1) deprive property owners of a prompt and

[6] Although various courses of relief are available to Glendale Federal in the District Court to compel compliance with the judgment, Glendale Federal presently is seeking to obviate the need for further judicial intervention in the matter. The District Court has been apprised of the City's position, and, if necessary, Glendale Federal presently intends to initiate enforcement proceedings.

efficacious remedy; (2) permit private property to be put to public use without payment of any compensation; and (3) virtually eliminate the market for real property subject to such confiscatory regulation.

1. The Remedies Available to an Aggrieved Landowner

Under the ruling below, a property owner is left with but two remedies: mandamus and declaratory relief. In respect to the former, the property owner finds that a legislative enactment subsequent to any denial of the property owner's application for development will sound the death knell for the property owner's mandate proceeding. See *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 125, 109 Cal.Rptr. 799, 514 P.2d 111 (1973).

As for declaratory relief, even if the property owner prevails at trial, no relief would be forthcoming to compensate the property owner for the carrying costs of his real property, including ad valorem property taxes, for the period of time his land was impermissibly regulated.[7] Rather, in light of an adverse judicial declaration, the government entity, while professing to act in good faith, would merely "go back to the drawing board" and (1) commission and undertake new studies; (2) hold new public hearings; (3) make new findings; and (4) eventually enact new legislation. All the while, the

[7] Under California law, if the property owner prevails in a condemnation proceeding, whether commenced by him or the government, he is entitled to an award compensating him for his attorneys' fees. Sections 1036 and 1235.140, California Code of Civil Procedure. By elimination of the remedy of money damages, however, it appears that the property owner, even if he prevails in his mandate or declaratory relief proceeding, will not be entitled to recoup any portion of his attorneys' fees.

property owner is further prevented from using or developing his property, and is left in a quandry as to whether the effect of the new legislation will be of any practical difference.[8]

As long as the governmental entity is under no effective restraint no matter how overreaching the regulation, the remedies being afforded to the property owner result in neither a prompt nor final resolution of the property owner's grievance.

2. Private Property Can For All Practical Purposes Be Taken For And Be Put To Public Use Without Any Payment Of Just Compensation

Under the decision of the California Supreme Court, a property owner *never* receives compensation when an impermissible restriction is determined to exist. There is neither compensation for the past error of the governmental entity, nor is there any payment forthcoming for the period of time necessary to adopt successor legislation that may, or may not, obviate the impermissible restriction and, hopefully, satisfy the property owner's grievance.

If it is the purpose of a governmental entity to prevent development of a parcel of real property so as to keep it in its natural state, it is far more economical for the governmental entity to use regulation — and not its power of eminent domain — to accomplish its purpose: the governmental entity need not pay compensation, and the property remains on the tax rolls with the property owner retaining the dubious distinction of paying the government for the "privilege" of not using his land.

[8] Given the congested calendars of the trial courts (especially in California), the time necessary for appellate review, and the economic resources required for a property owner to pursue litigation, it is clear that a governmental entity would benefit from additional litigation: not only would the property involved in the litigation be subject to the restriction imposed by the governmental entity during the litigation, but continued proceedings may sap the economic resources of the property owner so that he is financially unable to continue to vindicate his rights. Time clearly is on the side of "city hall" — the longer the better if frustration of development is the goal.

3. The Market For Real Property Subject To Confiscatory Regulation Would Virtually Be Eliminated

It is axiomatic that a confiscatory regulation prohibiting the reasonable utilization of real property will have a "chilling effect" upon the marketability of that property. Few people want to buy a lawsuit. This is not to say, however, that there is no market; the diminution of the value of real property subject to confiscatory regulation will necessarily reduce the price that the governmental entity will be required to pay if it later seeks to acquire the property by exercise of its power of eminent domain.

B. AFFIRMANCE OF THE JUDGMENT OF THE CALIFORNIA SUPREME COURT WILL ENGENDER EXCLUSIVITY IN LIVING CONDITIONS AND WORK TO THE DISADVANTAGE OF THE GENERAL PUBLIC

By enacting confiscatory regulations, so as to thwart development without the payment of just compensation, a governmental entity may accomplish the following: (1) it can limit the number of its residents, and thereby put the burden upon neighboring areas to absorb any population increase (and thus avoid its residents paying for the costs of expanded social services); and (2) it can cause the values of improved parcels owned by its existing residents (including the individual regulators themselves) to appreciate at the expense of the regulated parcels. In short, with little or no new development, and the cost of construction continuing to escalate, a governmental entity can, under the decision of the California Supreme Court, attain whatever degree of exclusivity it desires and make itself a haven for a few at the expense of the general public.[9]

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[9] The famed swallows may always be welcomed to return to the City of San Juan Capistrano, but persons in need of housing may not enjoy the same hospitality.

IV
CONCLUSION

The decision of the California Supreme Court effectively abrogates the constitutional guarantee that property shall not be taken without payment of just compensation. It must be reversed.

Respectfully submitted,

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APPENDIX A

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February 19, 1980

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Re: *Agins v. City of Tiburon*
United States Supreme Court—No. 79-602

Gentlemen:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above-captioned case now pending before the United States Supreme Court. On behalf of the attorneys for the Appellants in that case, I hereby give such consent.

Very truly yours,

JOHN P. POLLOCK

for POLLOCK, WILLIAMS &
BERWANGER

JPP:jb

cc: Gideon Kanner, Esq.
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[LOGO]

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RE: *Agins v. City of Tiburon*
U.S. Supreme Court No. 79-602

Dear Mr. Peck:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above captioned case now pending before the United States Supreme Court, on behalf of Glendale Federal Savings and Loan Association.

On behalf of the attorneys for the Appellees in that case, I hereby give such consent.

Very truly yours,

ROBERT I. CONN

ROBERT I. CONN
Town Attorney

RIC:sb